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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 1019

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

T. BUETTNER AND COMPANY, A CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

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Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 133 F. (2nd) 306 (R. 514-516).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 248 of the Judicial Code, as amended. 48 U. S. C. 347. The date of the judgment order in the District Court is April 15, 1942 (R. 460). On February 11, 1943, this judgment was reversed with instructions to dismiss the complaint. (See opinion of Circuit Court of Appeals, R. 514-516.) The mandate of the Circuit Court of Appeals was filed in the District Court on March 5, 1943. On March 29, 1943, after due notice to Petitioner, the District Court, pursuant to said mandate, vacated the judgment order of April 15, 1942, and dismissed this suit. (See Appendix attached to this brief, and certified copy of said order entered by District Court.) *This suit is no longer pending.*

Questions Presented.

Whether under the circumstances of this case, the Administrator is entitled to an injunction as a matter of right, when the proof is conclusive that the alleged violations terminated long before the institution of this suit and there is no likelihood of their resumption in the future.

Whether this court has jurisdiction to entertain the petition for a writ of certiorari.

STATEMENT.

In view of the inaccurate statement of the facts by Petitioner, Respondent considers it necessary to make the following statement.

It was stipulated by the parties that Respondent, prior to October 24, 1938, was engaged in the sale at wholesale of yarns, threads, crochet threads, stamped merchandise, needlepoint, picture frames for needlepoint, and various types of notions and fabrics, none of which were manufactured by Respondent (R. 24-27); that to show how the stamped merchandise would look upon completion, "display models" of each item of stamped merchandise having a different design were made up and sold to customers of the Respondent for advertising purposes. A sample "display model" was first made up at defendant's place of business. 7 to 12 similar "display models" for each sample were then produced by alleged "homeworkers" outside Respondent's place of business. The first seven of these models were used by traveling salesmen to demonstrate to the trade how similar unfinished stamped merchandise will look upon completion. The remaining sample "display models" were sold to Respondent's customers to advertise similar unfinished stamped goods sold by Respondent (R. 24-27).

In making up stamped merchandise, a design is laid out on a piece of paper by Respondent's chief designer (R. 383). Holes are then perforated at close intervals along the lines of the design. This perforated paper is then taken to Respondent's stamping department where this perforated paper is spread over a piece of cloth and a stencil of the design is made upon the cloth (R. 384). The stamped cloth is then returned to the chief designer who, with her assistant, an embroideress, selects threads or yarns having the right color and size for the design involved. The stamped material and selected threads are then given to an artist employed by Respondent at its place of business who commences work on an "original sample display model" under the supervision of the chief designer. If it is found that colors do not blend or fit properly, threads or yarns are removed and others substituted (R. 385). The time consumed by this embroideress is recorded on slips similar to Petitioner's Exhibit 18 (R. 501) which are called "estimate sheets" (R. 385). On this sheet is recorded (a) the luster, type, color and size of the threads used, (b) the name of the embroideress, and (c) the estimate cost and time of the embroidery work (R. 501).

Upon completion, the "original sample display model" together with 12 similar unfinished pieces of stamped cloth are turned over to the display model department where charts and specifications similar to Respondent's Exhibits 5 and 6 (R. 431-4) are made up. The chart is stamped with the design involved on the "display model" and specifications are set forth on this chart describing the nature of the work to be performed. The chart, specifications, stamped material and threads are then placed in a package and a "homeworker" is then selected who is available and capable of doing the particular work involved and the package is then forwarded to such "homeworker" by mail with contracts on forms similar to

Respondent's Exhibits 2 or 3 (R. 425-427, 325) which have been filled out to include the name and address of the "homeworker," the price Respondent is willing to pay for the work, the nature and type of work to be done, and the time when the same is to be completed. If the contract and work submitted is accepted by the "homeworker," the Respondent next receives the return of the completed work with the contract signed by the "homeworker" (R. 386-387).

The undisputed facts disclose that these "homeworkers" were women having long experience in their profession who were experts and highly skilled in their trade (R. 40, 53, 61, 83, 115, 131, 162, 178, 199, 221, 241). They were required to prove their skill and qualifications before work was offered to them (R. 35, 36, 46, 59, 71, 106, 120, 155). Unlike the average employee, these women did business with companies of their own choosing. They were mostly housewives whose household duties include cooking and care of their homes and families (R. 30, 46, 62, 69, 83, 99, 112, 120, 146, 156, 173, 199, 220, 231, 249, 355, 369). All of these women have been engaged in this type of work for 17 years or longer (R. 31, 69, 83, 106, 120, 155, 169, 221, 231, 263-4, 356, 368). Many of them worked for other companies before doing business with the Respondent (R. 29, 53, 70, 91, 146), and actually worked for other concerns at the same time they worked for Respondent (R. 70, 71, 91, 97, 100, 113, 127, 130, 204, 360). (See also Account Book of witness Anna Evans, Petitioner's Exhibit 15) (Tr. 504-511). The type of work involved required the skill of artists who had an intimate knowledge of many different kinds of intricate stitches (R. 177, 209, 272, 326). One person may do the work one way and another person another way (R. 210).

The "homeworkers" read the contracts sent them and knew what they contained (R. 48, 88, 112, 116, 123, 202,

219, 362). Each contract was signed by the "homeworker" and returned with the work (R. 23, 48, 54, 60, 64). Upon completion and return of the work in accordance with the contract, the "homeworker" was paid the contract price agreed upon (R. 37, 129, 160, 163). Payment was by check similar to Respondent's Exhibit 4 (R. 429), payable to the order of the "homeworker" and drawn by Respondent on its "contract account."

There were no requirements as to what days or weeks or numbers of hours during any day that a "homeworker" should work on any job or when she should start or stop the work sent to her. These matters were left to her discretion (R. 77, 78, 32, 55, 67, 97, 115, 128, 148, 160, 162, 186, 205, 245, 257, 267, 363). The work was usually done when the "homeworker" was not busy with her household or other activities (R. 32, 67, 83). The work was not performed on an hourly basis and payment was not made by the hour but according to the price agreed upon (R. 37, 57, 74, 117, 135, 162, 207, 229, 247, 257). The "homeworkers" testified that they considered this work to be "pick up work," something they might pick up and set down when they were not busy with other things (R. 55, 72, 115, 121, 129, 138, 146, 160, 357). It was spare time work on which they did not work steadily (R. 116, 121) as they would have been required to do if they had been employees of Respondent. No record of hours or time spent was kept by the "homeworkers" (R. 35, 39, 57, 74, 94, 117, 134, 142, 151, 158, 267, 358). In order to receive her compensation, a "homeworker" must live up to her contract obligations.

The Respondent did not control or direct (1) the place where, or (2) the conditions under which the work was done. There was no requirement that the work should be done in any particular place. It could be done wherever the "homeworker" desired (R. 32, 39, 40, 55, 62, 72,

75, 83, 96, 107, 115, 128, 143, 148, 161, 162, 186, 187, 203, 227, 258, 268, 363). In many cases "homeworkers" took their work with them on visits away from their homes (R. 32, 55, 115, 143, 148, 161). All "homeworkers" furnished their own places to work (R. 42, 56, 76, 116). None of the "homeworkers" living outside the City of Chicago had ever been to Respondent's place of business in that city, nor have representatives of the Respondent ever gone to the homes of "homeworkers" (R. 256-7, 42, 52, 53, 70, 75, 94, 111, 126, 159, 203).

No control was exercised over the persons who did the work. Many "homeworkers" contracted for work under fictitious names as well as in the names of their mothers, sisters and other persons (R. 53, 58, 78, 79, 125, 132-3, 149, 153, 155, 162, 357, 363-4). They also helped their friends and others with their work (R. 39, 52, 91, 96, 97, 99, 129, 146, 162, 361, 376). In many cases other people helped them complete their contracts (R. 57, 59, 72, 96, 129, 146-7, 189, 268, 357, 363-4, 377).

There was no requirement that the "homeworkers" should work exclusively for Respondent. While working for Respondent, or between jobs, they had the right, if they so desired, to work for other concerns than Respondent even on competitive or similar work (R. 42, 56, 73, 91, 116, 129, 189, 204, 360). Many "homeworkers" while engaged in work for Respondent contracted for work from other companies, many of whom were competitors (R. 70-71, 91, 100, 113, 127, 130, 204, 280-1, 360).

There was no requirement that any "homeworker" should do additional or other kind of work for Respondent than that contracted for (R. 130). Each job was a separate piece of business and stood on its merits (R. 73, 117, 131-5, 161, 205, 228, 258, 269, 285, 378). If a "homeworker" did not wish to accept work sent to her, she could return it (R. 38, 57, 73, 95, 114, 130, 149, 184,

204-5, 226, 242-3, 257, 266, 283, 332, 361). If the price stated in the contract was unsatisfactory, she could refuse to accept the work (R. 38, 95, 114, 148-9, 226, 243, 257, 266, 283, 362). In many instances work was not accepted and was returned because it was "too tedious" (R. 38), "too difficult" (R. 184), "ill health" (R. 204-5), "out of the city and unable to do the work" (R. 226-7), "did not like the price" (R. 257), "did not like the type of work" (R. 130). Each "homeworker" furnished her own tools, which usually consisted of needles, embroidery hoops, scissors, and crochet hooks (R. 40, 56, 76, 99, 108, 129, 163, 228, 333). Although "homeworkers" were required to complete each job in accordance with the contract and specifications (R. 63, 71, 160, 195, 267) it was understood that if the work was not so completed, Respondent did not have to accept it (R. 55, 56, 71, 84, 95, 114, 115, 129, 131, 160, 161, 184, 204, 224, 228, 257, 266). If the work was not completed within the time specified in the contract, it was understood Respondent reserved the right to reject it (R. 56, 71, 72, 114, 148, 161, 204, 266). During the course of the work, Respondent had no right to compel the "homeworker" to discontinue the work and to discharge the "homeworker," or to substitute other work for that which she was doing (R. 390). The right remained, however, with both the "homeworker" and the Respondent to discontinue such work upon completion of any job or to contract for additional work at such price as might be satisfactory to both. The fact that a "homeworker" completed one piece of work for Respondent did not obligate her to accept other work (R. 38, 55, 73, 78, 117, 131, 149, 187, 205, 227, 258). The fact that a "homeworker" did one piece of work for Respondent did not create any obligation on the part of the Respondent to send other work (R. 38, 56, 73, 78, 117, 149, 161, 187, 205, 227, 258).

Respondent had contracted with "homeworkers" for many years prior to October 24, 1938 (the effective date of the Fair Labor Standards Act) (R. 288, 306). Prior to that date Respondent consulted with its attorneys to ascertain whether or not it was within the provisions of the Act in its relationship with the so-called "homeworkers." It was advised that these individuals were "independent contractors" and not its "employees" and, hence, were not included within the coverage of the Act (R. 393). On the basis of this advice, Respondent continued its use of "homeworkers" in connection with work on "display models." At that time, and in fact up to the commencement of this suit, the Administrator had taken no position on this question by regulation or otherwise except to state that common law tests should be employed to determine whether an individual was an independent contractor or an employee (Wage and Hours Release No. 148, November 16, 1938, Vol. 2 Commerce Clearing House Labor Service, Section 23,626.188).

On April 16, 1941, Petitioner sent investigators to Respondent's place of business to investigate its records in order to ascertain whether or not Respondent was complying with the Act. The Respondent cooperated fully with these investigators and made all of its records available. After inspection and investigation Petitioner advised Respondent for the first time on April 16, 1941 that the Administrator considered these "homeworkers" to be its "employees" and subject to the Act (R. 312, 392). As a consequence of this action, the Respondent in *good faith* and *voluntarily* completely discontinued the use of "homeworkers" and has never resumed their use, and since that date all work formerly done by "homeworkers" has been performed by employees of the Respondent at its place of business in Chicago (R. 312, 391-2) and the Respondent has complied with the Act in every respect as to these employees and has paid them

37½¢ per hour, the scale prescribed by the Administrator for that kind of work, and has also kept records as required by regulations of the Administrator (R. 312-313, 393). This suit for an injunction was instituted on July 14, 1941, 81 days *after* Respondent's alleged violations had terminated. There is no evidence and *no finding by the trial court* that the Respondent was violating the Act at the time suit was brought, or that it then intended to violate the Act or was threatening to violate the Act in the future. Officers of the Respondent company testified, and their testimony is undisputed, that the Respondent has no intention of resuming its old practice of employing "homeworkers" in the future (R. 393, 313). The complaint alleges in paragraph 6 that Respondent, since the effective date of the Act, "and continuously to the date hereof" violated and "is violating" the provisions of the Act mentioned therein (R. 6). These allegations are not sustained by proof, but, in fact, all of the evidence is to the contrary. The complaint contains no averment that the Respondent threatens and intends to continue to violate the Act in the future unless enjoined.

Petitioner unfairly and without justification assumes throughout his petition that these "homeworkers" were "employees" of Respondent within the language of the Act and that Respondent was violating the Act. The Circuit Court of Appeals did not decide this question, but did say that "whether Respondent was within the purview of the Act was not free from doubt" (R. 516).

The good faith of the Respondent is established by the opinions and findings of the trial judge and that of the Circuit Court of Appeals. The trial court said:

> "In the case at bar the defendant unquestionably thought that it was within its legal rights. When the Fair Labor Standards Act became effective it sought advice of counsel, highly competent counsel. In good faith it thought that it was not an employer and that

these 'homeworkers' were not employees. It is true that in coming to that conclusion it assigned to the word 'employee' and the word 'employ' the limited meaning which has generally been assigned to these words—the limited meaning of master and servant, but the court is thoroughly convinced that they acted in good faith'' (R. 449).

OBJECTIONS TO GRANTING WRIT.

I.

The Circuit Court of Appeals did not err in reversing the judgment of the trial court.

The purpose of an injunction is not to afford a remedy for what is past, but is to prevent future mischief. It is not used for the purpose of punishment or to compel a defendant to do right, but to prevent or deter such defendant from doing wrong in the future. *J. C. MacFarland Co.* v. *O'Brien,* 6 F. (2d) 1016 (D.C. Ohio 1925), *Fleming* v. *Phipps,* 35 F. Supp. 627 (D.C. Md. 1940), *Fleming* v. *National Bank of Commerce,* 41 F. Supp. 833 (D.C. W.Va. 41).

Section 16 of the Act provides an adequate scope of punishment by ordinary criminal procedure for past violations. Section 17 of the Act looks to the future and provides for injunctions to prevent further violations. It is a rule of equity that an injunction will not issue where the wrong complained of has fully and definitely terminated before the institution of suit and where there is no evidence that the offense is likely to be repeated in the future. Courts of equity are not to be used to punish past offenses, but only to prevent future wrongdoing and they will not do a useless thing. *U. S.* v. *U. S. Steel Corp.,*

251 U.S. 417, 445, 64 L. Ed. 343, 40 S. Ct. 293, *Securities and Exchange Commission* v. *Torr,* 87 F. (2d) 446, 50, (C.C.A. 2nd 1937), *Securities and Exchange Commission* v. *Universal Service Assn.,* 106 F. (2d) 232 (C.C.A. 7th, certiorari denied 308 U.S. 622), 84 L. Ed. 519, 60 S. Ct. 378, *Walling* v. *Shenandoah-Dives Mining Co.,* 134 F. (2nd) 395 (C.C.A. 10th), *Fleming* v. *Phipps,* 35 F. Supp. 627 (D.C. Md. 1940), *Fleming* v. *National Bank of Commerce,* 41 F. Supp. 833 (D.C. W.Va. 1941).

The statutory requirement of Section 17 of the Fair Labor Standards Act that an injunction should be issued only "FOR CAUSE SHOWN" indicates that the usual statutory rules applicable to injunctions are to be followed with the exception that it is not necessary for the complainant to show an irreparable injury. This language casts the burden upon the parties seeking an injunction to establish *cause* for its issuance. This was not done in the instant case.

II.

The decision in this case is not in conflict with decisions of other Circuit Courts of Appeals.

Petitioner contends that the decision in this case conflicts with those of *Fleming* v. *Jacksonville Paper Company,* 128 F. (2d) (5th C.C.A.) 295, and *Fleming* v. *Cincinnati Union Terminal Company,* 117 F. (2d) (6th C.C.A.) 1012. No conflict exists for both of these cases are readily distinguishable upon their facts.

In the *Jacksonville* Case, the court said at page 339:

> "Section 17 of the Act gives jurisdiction to grant, but does not require in every case a grant of an injunction. The issuance of an injunction is within the discretion of the court."

In that case (a) there was no proof that the defendant did not intend to violate the Act in the future, (b) the cessation from the alleged violations was not voluntary as in the case at bar but was the direct result of official pressure, and (c) it was not clear from the evidence whether the alleged violations by the defendant were continuing up to the time of the filing of the suit. "Cause" was shown of the possibility of violations in the future.

The facts in the *Cincinnati Union Terminal* Case are also entirely different. The defendant in that case did not discontinue the alleged violations until subsequent to the institution of suit, and consequently the cessation was involuntary. Moreover, defendant did not introduce any evidence that it did not intend to violate the Act in the future. It is apparent, from the memorandum opinion, that "cause" was shown of the danger of future violations.

In *Walling* v. *Shenandoah-Dives Mining Co.*, 134 Fed. (2d) (C.C.A. 10th) 395, the facts indicated that approximately six months after the institution of action by the Administrator but before trial the alleged violations were discontinued and that thereafter the defendant was in full compliance with the Act. The court, in holding that an injunction should not issue, said at page 397:

> "But if during the proceedings violations cease and the accused admittedly is in full compliance, without reason to believe that future violations will occur, the justiciable controversy disappears and the question becomes moot. It would seem to be an idle gesture to enjoin violations of the Act when they have ceased and there is no reason to fear they will again be renewed."

Obviously each case must necessarily stand upon its own circumstances and whether there has been "cause shown" for the issuance of an injunction must necessarily

depend upon the facts of each case, 32 C. J. 29. Therefore, unless the facts presented are similar, there can be no conflict in the decisions. It is submitted that the cases above referred to are not in conflict with the decision in the case at bar.

III.

The decision in this case is not in conflict with decisions of this court and of other Circuit Courts of Appeals in cases arising under other statutes.

Petitioner asserts that this question is an important federal question and is in conflict with principles established by decisions of other cases in both this court and other Circuit Courts of Appeals arising under other statutes. All of the cases cited by Petitioner in support of this statement were decided under statutes containing vitally different provisions concerning the power to issue injunctions. These cases are also easily distinguishable on their facts.

In the case of *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, as in all other cases involving the National Labor Relations Act (29 U. S. C. 160), the power of the Administrator to issue a cease and desist order is not for "cause shown," but is based upon a showing that a person *has engaged in* or is engaging in any such unfair labor practice.

Section 10(c) of the National Labor Relations Act specifically states:

> "If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint *has engaged in* or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, * * *" (emphasis ours.)

Power is expressly granted to enjoin for past violations. No similar grant of power is given to the Administrator under the Fair Labor Standards Act.

All of the Federal Trade Cases cited by petitioner such as *Federal Trade Commission* v. *Goodyear Company*, 304 U. S. 257, involve either (a) the Clayton Act (15 U.S.C. 21) which grants the power to the Commission to issue cease and desist orders "whenever the Commission or board vested with jurisdiction thereof has reason to believe that any person is violating or *has violated* any of the provisions of the Act, * * *" (emphasis ours) or (b) Section 5 of the Federal Trade Commission Act (15 U.S.C. 45(b)) which provides:

> "Whenever the Commission shall have reason to believe that any such person, partnership, * * * *has been* or is using any unfair method of competition in commerce, * * * it shall issue and serve upon such person, partnership, or corporation a complaint. * * *" (emphasis ours.)

In each of the cases cited the Acts involved specifically granted power to issue cease and desist orders for past violations. The cases obviously are not similar.

Petitioner has also cited the case of *Otis & Co.* v. *Securities and Exchange Commission*, 106 F. (2d) 579 (C.C.A. 6th) and asserts that no distinction exists between the Securities Exchange Act and the Fair Labor Standards Act in respect to the power to issue injunctions. This decision relies on Section 78U(a) (15 U.S.C. 78U(a)) of the Securities and Exchange Act as the basis for the authority of the Commission to proceed in making its investigation and holding its administrative hearings. This section provides:

> "The Commission may, in its discretion, make such investigation as it deems necessary to determine whether any person *has violated* or is about to vio-

late any provision of this chapter or any rule or regulation thereunder, * * *" (emphasis ours).

The above case is also distinguishable in that the court specifically found at page 584 that the dealer might in the future resume his practice of selling securities in violation of the Act, and issued an injunction for that reason.

In *U. S.* v. *Freight Association,* 166 U. S. 290, an injunction was sought by the government to enjoin the operations of the defendant under an agreement alleged to be in violation of an Act of Congress to protect commerce against unlawful restraints and monopolies. The defendant was an association of railroads, which association was dissolved during the pendency of the suit. This court stated in its opinion at page 308 that the defendants did not allege their purpose not to enter into a similar agreement in the immediate future. In the instant case the Circuit Court of Appeals in its opinion pointed out that there was no finding by the trial court that the defendant intended to violate or was threatening to violate the act in the future (R. 515), and that the court could not have so found for all the evidence was to the contrary.

In *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U. S. 498 the Commission contended that inasmuch as its temporary "cease and desist order" was operative for only two years from the date of its issuance, the question of the authority for such order had become moot. The order expired November 15, 1910, and the case was argued before the Supreme Court on December 9, 1910. The only effect of that decision was a holding that the rights of litigants were to be adjudicated at the time of the beginning of the litigation. There, also, was a finding that the Commission had not asserted any intention to refrain from issuing a similar order in the near future.

Petitioner has made the broad statement (petition page 14, footnote 7) that the case of *Goshen Mfg. Co.* v. *Myers Mfg. Company*, 242 U. S. 202, is at variance with the decision of the Circuit Court of Appeals in the instant case so far as general equity principles are concerned. There this court noted that the defendant had retained the means of further infringement of the plaintiff's patent, and stated: "we have assumed that there was infringing done and *threatened*, * * *" (emphasis ours).

Each of the last three cases is distinguishable upon its facts.

IV.

Under the facts, the decision of the court below is not of such importance as to burden the administration of the Fair Labor Standards Act.

Since each case must stand upon its own facts in so far as the issuance of an injunction is concerned, the question involved is not of such great importance in the administration of the Fair Labor Standards Act. Only that class of cases will be affected where, from the facts, there is no likelihood of a resumption of the alleged violations in the future. As has been previously shown, the Act supplies the Administrator with two means of enforcement (a) criminal remedy (Sec. 16) and (b) civil remedy (Sec. 17). If injunctions should issue as a matter of right, regardless of the discontinuance of alleged violations and where there is no likelihood of their repetition in the future, then the harassment, stigma and expense of litigation placed upon commerce would be in direct contravention to the purposes of the Act. Such a rule would convert the civil remedy of injunction given under Section 17 into a criminal remedy which would be used to penalize an alleged violator for past alleged violations although there was no likelihood

of repetition in the future. Since it is possible that anyone may at some time violate the Act, Petitioner's argument would justify the issuance of an injunction against everyone so that the Administrator would not be concerned with future violations. The absurdity of this argument is apparent.

Petitioner's argument assumes that the court below held that the mere cessation of violations obviated the necessity of an injunction. As Respondent has endeavored to show, the rule contended for is applicable only where there is no likelihood of resumption of alleged violations in the future. When this circumstance exists, the purpose of an injunction has been fulfilled.

Since, under Section 17 of the Act, injunctions may issue only for "cause shown" it is necessary that in each case cause be shown by the Administrator and that the general equity principles relative to injunctions be applicable. The position taken by the Petitioner completely overlooks this requirement of the Act, and it is submitted that if it is desirable as a matter of public policy, that injunctions should issue as a matter of right, then this question should be the subject-matter of legislative relief rather than judicial interpretation. As was stated by this Court in an opinion decided within this term, "It is not for us to add to the legislation what Congress pretermitted." *U. S.* v. *Monia,* 87 L. Ed. 297.

The Administrator's regular periodic inspection of an employer's records serves as an ample check to keep the Administrator advised concerning compliance with the Act. This inspection is made anyway. Therefore no added burden is cast upon the Administrator.

In the instant case Respondent in good faith not only voluntarily terminated its alleged violations a long time prior to the institution of suit and disavowed any intention

of the resumption of the same, but the evidence introduced upon the trial conclusively established that it had changed its methods of doing business and was embroidering its "display models" at its place of business in Chicago, Illinois in full compliance with the Act. This action is conclusive as to the honesty of its purpose not to use "homeworkers" again.

V.

This court is without jurisdiction to hear this petition.

On February 11, 1943, the judgment of the District Court was reversed with instructions to dismiss the complaint (Opinion of the Circuit Court of Appeals, R. 514-516). The mandate of the Circuit Court of Appeals was filed in the District Court on the 5th day of March, 1943. On March 29, 1943, upon due notice to Petitioner, the District Court, pursuant to said mandate, vacated the judgment order on April 15, 1943, and dismissed this suit. (See appendix attached to brief and certified copy of order of District Court filed in this Court.) *This suit is no longer pending,* and this Court is without jurisdiction to entertain this petition.

CONCLUSION.

It is respectfully submitted that the cause warrants no review by this Court, and, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

WALTER BACHRACH,
Counsel for Respondent.

HERBERT H. KENNEDY,
ROBERT C. KELSO,
Of Counsel.